

Supreme Court, U. S.

FILED

MAY 16 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1437

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL-CIO,

v. *Petitioner,*

CARRIER AIR CONDITIONING COMPANY

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition For A Writ of Certiorari To The
United States Court of Appeals For
The Second Circuit

**BRIEF FOR CARRIER AIR CONDITIONING COMPANY
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a) is reported at 547 F.2d 1178. The decision and order of the National Labor Relations Board (Pet. App. 31a-44a), including the underlying decision of the Administrative Law Judge (App., *infra*, pp. 1a-42a) are reported at 222 NLRB 727.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977. The petition for writ of certiorari was filed on April 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals was warranted in concluding that the Union's reaffirmation and enforcement of penalty provisions in its agreements with New York area sheet metal contractors for the stated purpose of keeping Carrier's Moduline air conditioning units out of the New York construction market violated Sections 8(e) and 8(b)(4)(ii)(B) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth in the petition at pp. 3-4.

STATEMENT

A. Background

The facts are fully set forth in the court of appeals' decision (Pet. App. 5a-12a). Briefly, since the mid-1960's, Petitioner (the Union or Local 28) has maintained a boycott against Respondent Carrier's factory-fabricated Moduline air conditioning units. The boycott has been implemented through various means over the years, but principally through enforcement and threatened enforcement of restrictive clauses in the Union's labor contracts with New York

area sheet metal contractors.¹ The Union has, with the contractors' acquiescence, consistently interpreted those clauses to proscribe installation of Carrier's Moduline units by signatory contractors' employees unless the plenum portions of the units are made in a New York area sheet metal shop employing Local 28 members. (Pet. App. 16a, n. 8).

The Union has repeatedly sought Carrier's agreement to allow fabrication of the plenums in New York shops, but with only a few exceptions arising out of efforts to settle this dispute, Carrier has refused because of the inability of the local shops to meet quality and performance standards. (Pet. App. 35a-36a). Throughout the dispute, Union officials have told Carrier that unless it would agree to their demands for the plenum fabrication work, the Union would not allow Moduline units "to come into New York." (Pet. App. 8a, 11a, 37a-39a).

B. The Union's Violations of the Act

In 1973, the Union's executive board adopted, and its members approved, a resolution that "no allowance be made in the c.b.a. [collective bargaining agreement] at all to allow the dual Moduline Mixing Box in the New York city area." (Pet. App. 37a). Later that year, when a Union member employed as a sketcher on the Van Etten Drug Treatment Center project erased the Moduline units required by the project specifications from the drawings for the job, the president of Local 28 told Carrier's district manager that the Union had "refused to let them sketch

¹ The relevant contract clauses are set forth in the court of appeals' decision. (Pet. App. 6a, n. 3).

the job" and would "not permit this unit to come in, into New York." (Pet. App. 11a, 38a). Unfair labor practice charges filed as a result of these incidents led to settlement discussions in late 1973 which concluded unsuccessfully with the Union's president again telling Carrier that "he could not permit this unit to come in." (Pet. App. 39a).

In early 1974, architects for the new Babies Hospital Addition to Columbia Presbyterian Hospital in New York specified the use of Carrier Moduline units in that project. These specifications were incorporated in the contract between Columbia Presbyterian and H. Cohan Contracting Corporation covering all the mechanical work for the project, and Cohan duly ordered the Modulines as specified. Thereafter, Cohan subcontracted certain sheet metal work, including the installation of the Moduline units, to General Sheet Metal, Inc., whose employees are represented by Local 28 and covered by the labor contract in issue here. (Pet. App. 11a).

The Union subsequently filed charges against General with the contractual Joint Adjustment Board, alleging that General had violated the restrictive clauses of the labor contract by agreeing to install the Modulines. The remedy proposed by the Union was that General pay \$2153.60 into the Local 28 Sick Dues Relief Fund. General thereupon ceased installation of the units and did not resume until Carrier agreed to reimburse it for the amount demanded by the Union. (Pet. App. 11a).

C. The Proceedings Before the Board

The complaint issued by the NLRB's General Counsel alleged that the Union's reaffirmation and enforcement of the restrictive clauses of its agreement with General and other contractors as against the Carrier units violated Sections 8(e) and 8(b)(4)(ii) (B) of the Act. The incidents noted above involving the executive board's resolution and the erasure on the Van Etten sketches were alleged as additional violations of 8(b)(4)(i) and (ii) (B).

The ALJ found that the Union had violated the Act as charged. Crediting the General Counsel's evidence, he concluded that the Union's contract-enforcement efforts in this case were calculated to "influence the business decisions of the hospital builders" at the Van Etten and Presbyterian Hospital projects and to cause Carrier to surrender its right to fabricate the plenum portion of the Moduline units "to others with whom Local 28 has a collective bargaining agreement . . ." (*Infra*, pp. 35a, 37a). The ALJ found several indicia that the Union had acted with an illegal secondary objective. First, he noted various direct statements by Local 28 officials to Carrier representatives evidencing an objective vis-a-vis Carrier; secondly, he found that the sheet metal contractors against whom the Union enforced its restrictive agreement had "no right to control" the decision whether Modulines would be used on the projects in question; and thirdly, he found that fabrication of Moduline plenums was not work traditionally and historically performed by Local 28 members, because, *inter alia*, the "Carrier Moduline is a new and different product . . ." (*infra*, pp. 33a-35a). As to the

means used by the Union to enforce the boycott, the ALJ found that several acts, including the filing of charges against General leading to the payment of the \$2,153.60 penalty, constituted prohibited coercion. He also found that the Union had induced members not to handle Modulines in violation of Section 8(b)(4)(i)(B) through the presentation and adoption of the resolution not to allow Modulines in New York. (*Infra*, pp. 38a-39a).

The Board reversed the ALJ and dismissed the complaint, principally on the ground that no coercion within the meaning of clause (ii) of Section 8(b)(4) had been shown. In so holding, the Board stated that it found it "unnecessary to reach the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed." (Pet. App. 43a). The Board further reasoned that the resolution adopted by the Union was not an illegal inducement, since it "merely asked the union members to decide whether their contractual rights should be waived." (Pet. App. 40a).

D. The Court of Appeals' Decision

The court of appeals reversed the Board's decision as to the 8(e) and 8(b)(4)(ii)(B) allegations of the complaint and remanded the case to the Board "for proceedings not inconsistent with [its] opinion." (Pet. App. 29a).² Noting that the Union had conceded before the Board "that its principal dispute was with Carrier," the court found that the Union's application of the restrictive clauses in its agreements

² The court affirmed the Board's dismissal of the Section 8(b)(4)(i)(B) allegations.

with the contractors to apply indirect leverage against Carrier embodied a clearly secondary objective. The court found it unnecessary to remand the case to the Board for further findings on the "primary/secondary and work preservation questions," because in its view the Board had reached these questions, "albeit implicitly," and further findings would be "of little assistance" in the circumstances presented. (Pet. App. 17a and n. 9).

With respect to the issue of coercion, the court found that the "fines authorized by the agreement here plainly were applied, or were threatened to be applied, in a way that gave the Union economic leverage over the subcontractors," and that "as applied to the individual subcontractor, the fines were unquestionably coercive" (Pet. App. 28a). The court rejected Board counsel's argument that the contractual Joint Adjustment Board procedure utilized here was "not economic retaliation but an agreed upon arbitral procedure for compensation for a breach of contract." (Pet. App. 23a). The court noted that the Board itself had not taken that position and that, on the facts, any comparison of the procedure used here with "bona fide arbitration" could not be sustained. (*Ibid.*).

ARGUMENT

The decision of the court of appeals is correct and not in conflict with other decisions. No issue warranting review by this Court is presented.

1. Petitioner contends that the court of appeals, in determining that a remand for further Board consideration of "the primary-secondary and work preservation issues" was unnecessary, departed so far

from accepted procedures on review of administrative agency decisions as to require "exercise of this Court's power of supervision." (Pet. 14). The contention is without merit.

Initially, we are not aware, and the petition fails to demonstrate, that the fault which Petitioner finds with the procedure followed by the Second Circuit in this case poses any recurrent problem in the administration of the Act, much less a problem of such magnitude as to call for this Court's intercession. The contrary is clearly suggested by the fact that the agency primarily responsible for enforcing the Act has decided not to request further review in this case.

Nor does the one case on which Petitioner relies in this regard, *N.L.R.B. v. Enterprise Ass'n, Local 638*, — U.S. —, 97 S. Ct. 891, 905 (1977), when considered with the Second Circuit's decision herein, show a pattern of procedural error by the courts of appeals which this Court must exercise its supervisory power to correct. The procedural problem this Court pointed out in *Enterprise* was that the D. C. Circuit had reweighed the facts and drawn its own factual inferences when the Board's contrary fact findings were supported by "substantial evidence on the record considered as a whole." 97 S. Ct. at 905. No such departure from the statutory standard of review occurred in this case; the court of appeals did not set aside any of the Board's findings of fact nor draw inferences contrary to the Board's. Furthermore, this Court granted review in *Enterprise* to resolve "an apparent conflict between the circuits" (97 S. Ct. at 896), not to exercise supervision over

an appellate court's departure from the proper procedure on review in one case. Consequently, *Enterprise* fails to illustrate that such procedural error poses the serious sort of problem which would, in itself, warrant this Court's attention.

Moreover, the Petition fails to demonstrate that the procedure followed in this case was, in fact, improper. The court of appeals did not reject the necessity for agency findings with respect to the lawfulness of the Union's object. Rather, it simply rejected the necessity for a remand for further agency proceedings on that issue in the circumstances of this case. Thus, Petitioner's contention actually amounts to no more than a quarrel with the court's conclusion that the ALJ's findings of fact concerning the secondary object of its boycotts "were essentially accepted by the Board" and that "additional findings would be of little assistance." (Pet. 16-18). We submit the court of appeals was well warranted in concluding, based on the Board's treatment of the ALJ's findings, that "the Board did reach the questions, albeit implicitly" (Pet. 17a, n. 9), and that the Union's contrary argument is without merit. But in any event, whether that conclusion was justified or not is a narrow factual question with significance only for the immediate case and not an issue deserving of this Court's attention.

Petitioner goes on to argue that, by concluding without a remand that the Union's object in this case was secondary, the court of appeals improperly foreclosed Board consideration of an "important federal question"—to wit: "the precise parameters of the work preservation doctrine" where, as here, a

"new and different product" is involved. (Pet. 19). But that issue would not, in any event, have been reached in this case in the wake of this Court's decision in the *Enterprise* case, *supra*. For *Enterprise* requires the conclusion that the Union here had a secondary object, whether or not the fabrication of Moduline plenums was "work traditionally and historically performed by members of the Union." (*Ibid.*).³

In *Enterprise*, this Court held that a union's efforts to force a jobsite subcontractor to cease handling prefabricated products specified by the general contractor or developer of the project had a secondary object even though the union was seeking "the kind of work traditionally performed by its members." 97 S. Ct. at 903-904, n. 16. The work in question in that case was cutting and threading of internal piping for Slant/Fin Climate Control air conditioning units; here it was fabrication and assembly of plenums for Carrier Moduline units. But in each case, the specific work the union sought was "work that it never had and that its employer had no power to give it, namely, the piping [or plenum fabrication] work on units specified by any contractor or developer who prefers and uses prepiped [prefabricated] units." *Ibid.* *Enterprise* establishes that

³ This case was decided a month before *Enterprise*, when the validity of the so-called "right to control" test for determining whether an object of a product boycott is secondary had not yet been decided. Accordingly, although the Second Circuit noted that the sheet metal subcontractors here lacked the right to control the work the Union sought, it expressly declined to decide the case on that basis, finding other "ample" evidence of a secondary object. (Pet. App. 19a, n. 12).

any product boycott carried out under such circumstances is secondary because its "tactical objects" necessarily include influencing persons other than the employer of the union's members. *Ibid.* Accordingly, *Enterprise* would unquestionably require a finding of a secondary object in the circumstances of this case,⁴ and Petitioner should not be heard to complain simply because the court of appeals found such an object without remanding the case for further agency proceedings.

2. The remaining issue which Petitioner seeks to raise—i.e., "whether a union, prohibited under *Enterprise* from picketing to enforce a work preservation clause, is also precluded from asserting a claim for breach of that clause against the contracting employer pursuant to the grievance and arbitration machinery of a collective bargaining agreement" (Pet. 21)—is not presented by this case.⁵ For as the court of appeals found, "the contract here did not involve the equivalent of bona fide arbitration." (Pet. App. 23a).⁶ The court went on to explain:

⁴ As the court of appeals noted (Pet. App. 17a), "The Union conceded, before both the ALJ and the Board, that its principal dispute was with Carrier, but, rather than applying its leverage directly against Carrier, the Union relied on the no subcontracting clause in its agreement with the [sheet metal contractors] Association to keep Modulines out of New York."

⁵ It should be noted, however, that Petitioner's formulation of this question tacitly concedes the correctness of the Court of Appeals' finding of a secondary object. For unless the Union's application of the contract in the circumstances of this case had a secondary object, picketing would not be foreclosed under *Enterprise*.

⁶ Pages 23a and 27a are transposed in Appendix A to the petition.

The contractual procedures under which General paid a fine—and pursuant to which other subcontractors were doubtless deterred from accepting work involving Modulines, thus enabling the Union to effectuate its repeated threat to Carrier to keep Modulines out of New York—were to be implemented by the ‘Joint Adjustment Board’ of 24 members, half from the Union, half from the subcontractors’ association. The factors that give true arbitration some resemblance to a court proceeding, particularly the presence of a neutral factfinder with no stake in the outcome of the dispute, were conspicuously absent here. (Pet. App. 23a, 28a).

In these circumstances, the court of appeals correctly concluded that the question “whether resort to bona fide arbitration procedures would constitute unlawful coercion” was not present and did not purport to decide it. Accordingly, this case does not present a vehicle for this Court’s consideration of that issue.

Furthermore, even if the Second Circuit’s holding here could be construed to apply broadly to any enforcement of work preservation clauses through contractual grievance procedures, the holding would not conflict with decisions of other circuits or with established principles of federal labor law. Every court that has ruled on the precise question has held that assessment of monetary penalties through contractual grievance machinery constitutes a form of economic coercion within the meaning of clause (ii) of Section 8(b)(4) of the Act. See the decision below and *Associated General Contractors of California, Inc. v. N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975); and cf. *Danielson v. Int’l Org. of Masters, Mates and*

Pilots, 521 F.2d 747, 753 (2nd Cir. 1975) (“the obvious purpose of the damage provision is to coerce . . .”), and *Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F.2d 848, 853 (9th Cir. 1975) (assessing fines under contractual grievance procedure “constitutes a form of coercive economic pressure not judicial in nature.”). And, as the court below noted, these holdings are solidly supported by the legislative history of the Act and previous cases interpreting the statutory terms “coerce or restrain.” (Pet. App. 24a-28a).

There is no conflict in the circuits on this point. Neither of the cases which Petitioner cites in its attempt to show such a conflict involved assessment of monetary penalties through contractual grievance mechanisms. The method of enforcement at issue in the *Enterprise* case was a simple refusal to install the boycotted product. Consequently, any reference in the D.C. Circuit’s opinion in that case to other means of enforcement is dictum.⁷ Nor is there any conflict between the Fourth Circuit’s decision in *George Koch Sons, Inc. v. N.L.R.B.*, 490 F.2d 323, 327 (1973), and the Second Circuit’s decision here. In the cited portion of the *Koch* decision, the Fourth

⁷ Petitioner’s reliance on statements in the D. C. Circuit’s opinion in *Enterprise* to show a conflict with the Second Circuit’s decision here is questionable, moreover, inasmuch as this Court reversed the D. C. Circuit’s decision and thoroughly rejected its reasoning in that case. At the least, the D. C. Circuit should be given the opportunity to reconsider the views it expressed in that case and decide what portions of its underlying reasoning, if any, remain valid in light of this Court’s decision, before being presumed to adhere to any of its earlier pronouncements.

Circuit simply observed that, although the work preservation clauses of a union's agreement with one contractor could not lawfully be extended to achieve a tactical object beyond that contractor, the clauses themselves were not automatically "nullif[ied]," but "remained available for appropriate application." 490 F.2d at 327. Nothing was said about the means by which such agreements could be enforced. Rather, the court was merely expressing the same proposition stated by the Second Circuit in this case—i.e., that even though enforcement of a work preservation agreement may be secondary and unlawful in some factual contexts, "[i]n its other applications, the same agreement may retain its validity." (Pet. App. 14a).^{*} Thus, instead of a conflict, the cases reveal only harmony with the views expressed by the Second Circuit.

Contrary to Petitioner's final contention, the decision below does not hold that an employer signatory to a work preservation agreement "may breach its contractual commitments with impunity," (Pet. 28), or that no "mechanism exists for enforcement by a union" of such a contract. (Pet. 25). Rather, the court of appeals recognized, as did the courts in each of the cases discussed above, that the legality of the union's contract enforcement effort depends on whether, in all the circumstances, the tactical object of the effort is to influence the immediate, signatory employer or to influence another, "elsewhere." If it is the latter, the agreement is secondary in that ap-

^{*} The Ninth Circuit expressed the same view in *Associated General Contractors of California, Inc. v. N.L.R.B.*, *supra*, 514 F.2d at 439.

plication under the test this Court announced in *National Woodwork Mfrs. Ass'n v. N.L.R.B.*, 386 U.S. 612, 644 (1967), and recently reaffirmed in *N.L.R.B. v. Enterprise Assn*, *supra*, 97 S. Ct. at 903-904 and n. 16. And in such circumstances, Section 8(e) expressly declares the agreement to be "unenforceable" by any means. Nothing in the Act or in the national labor policy requires that unions be afforded an "alternative mechanism" for enforcing work preservation clauses for such secondary, tactical purposes.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 16, 1977

APPENDIX

Decision of the Administrative Law Judge

1a

JD-406-75
Bronx, New York

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 2-CC-1296

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL-CIO

and

CARRIER AIR CONDITIONING COMPANY,
A DIVISION OF CARRIER CORPORATION

Case No. 2-CE-66

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL-CIO

and

CARRIER AIR CONDITIONING COMPANY,
A DIVISION OF CARRIER CORPORATION

and

THREE BORO SHEET METAL AND
VENTILATING CO., INC.,
Party to the Contract

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N.L.R.B.

Sol Bogen, Esq., New York, N.Y., for Respondent
Local 28.

Kenneth C. McGuinness, Esq., and Robert E. Williams, Esq., both of Washington, D. C., for Carrier Air Conditioning Co.

William Rothberg, Esq., New York, N.Y., for intervenor, Sheet Metal and Air Conditioning Contractors Assn., New York City Chapter.

DECISION

STATEMENT OF THE CASE

JAMES V. CONSTANTINE, Administrative Law Judge: This is an unfair labor practice case litigated pursuant to the provisions of Section 10(b) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 160(b). It was commenced by a consolidated complaint issued on February 28, 1974, by the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director for Region 2. That complaint is based on a charge filed on October 25, 1973, and one filed on December 27, 1973, by Carrier Air Conditioning Company, herein called Carrier. Said charges and the complaint name Sheet Metal Workers International Association, Local 28, AFL-CIO, herein called Local 28, as the Respondent, and the complaint names Three Boro Sheet Metal and Ventilating Co., Inc., herein called Three Boro, as Party to the Contract.

In substance, said complaint as amended at the hearing alleges that Respondent violated Section 8(b) (4) (i) and (ii) (B) and 8(e), and that such conduct affects commerce within the meaning of Section 2(6) and (7), of the Act. Respondent, also called Local 28 herein, as answered, admitting some allegations of

the complaint but denying that any unfair labor practices were committed. On November 18, 1974, Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc., herein called the Association, was permitted to intervene as an interested party.

Pursuant to due notice this case came on to be heard, and was heard before me, at New York, New York, from March 10 to 14, both inclusive, and April 15, 1975. All parties were represented at and participated at the hearing, and had full opportunity to introduce witnesses, file briefs, and offer oral argument. Briefs have been received from the General Counsel, Carrier, and Local 28. Respondent's motion to dismiss was denied.

Upon the entire record in this case, and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. AS TO JURISDICTION

Carrier, a division of Carrier Corporation, a Delaware corporation, is engaged in the United States in manufacturing, selling, and distributing air-conditioning equipment and related products. During 1973, a representative period, Carrier sold and distributed products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped from its place of business in interstate commerce directly to States other than the States in which it is located. I find that Carrier is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7) of the

Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Local 28 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *General Counsel's Case*

A. C. Contardi, Carrier's district manager for its machinery and systems division which covers metropolitan New York, testified substantially as follows: In such division Carrier "primarily operates in the construction and engineering phases" of refrigeration, heating, and "the entire line of air conditioning." When the owner of a building needs such equipment, Carrier works with the owner's architect and the owner's mechanical engineer "in the design of this equipment." As a result, Carrier's "equipment is part of the design, included in the specifications . . . so that when the job is bid by the owner through general contractors, we will get a fair chance to bid competitively."

After a contractor bids on a job, Carrier deals with contractor "to sell them the equipment, which meets the specifications, which is part of the design." A 37P unit is "a Moduline terminal device which controls the air, which varies the volume of the air which is discharged into the room." (See G.C. Exh. 2, app. A.) Another type of Moduline unit is in General Counsel's Exhibit 2, appendix B. 37P units have been manufactured by Carrier since 1963.

Carrier's 37A and 37P units are manufactured in Tyler, Texas, and prefabricated there. In 1966 and 1967, Carrier attempted to market the 37P unit in the New York City area. At that time Carrier showed such a unit to President Farrell and Mulhearn of Local 28. Said officials of Local 28 said that such unit "could not come into New York," but if "the so-called plenum [sic] section [thereof] should be made in [a] New York [shop, a Local 28 affiliated shop] then the unit could come in." Thereafter Carrier did supply such units for some buildings in the New York area. Farrell told Carrier that the unit "could not be installed, the lower section would have to be made in New York in a Local 28 shop . . . the fuser plate . . . and the plenum section [should be] made locally." Apparently Farrell's request was not honored by Carrier.

Later Carrier was "brought up on charges within" the Mechanical Contractors Association, to which it belonged, for making the above part of the unit away from New York. Farrell, who attended, complained that Carrier was "fabricating this stuff in a nonunion shop down in Texas," and stated "the unit as made would not come into New York." In January 1967, Carrier again met with Farrell. A "deal was consummated" to let Carrier proceed with two New York jobs it was supplying in return for Carrier's "proceeding to attempt to design a unit that would fulfill [Farrell's] requirements."

A few months later Carrier supplied the unit in the New York police office building. Farrell objected to Carrier as to the design of the job because, among other things, "they were using the Moduline unit as

designed in Tyler, Texas." Farrell also claimed that Carrier was not living up to the above "deal" which it made with Farrell. Ultimately they came to an agreement. (G.C. Exh. 2, app. G.) Said agreement in part provides that "Carrier . . . are presently developing a system of the terminal which would make possible the manufacture of the plenum [sic] by the Local" i.e., Local 28. As a result of said agreement Triangle Sheet Metal Company, which has a collective-bargaining contract with Local 28, received an order from New York City to provide the plenums for the police office building.

Following October 1967, when the foregoing agreement was entered into, Carrier made efforts to market the 37P units as redesigned in New York City, but "just couldn't sell the unit. . . . It was not economically feasible, it would not sell." So in 1970 Carrier introduced its 37A unit. This unit was manufactured in Tyler, Texas. In August 1970, Farrell requested Contardi of Carrier to abide by the agreement (G. C. Exh. 2, app. G), so that the plenums on 37A units would be manufactured in New York City. Contardi replied that Carrier had been unsuccessful in marketing the 37P unit, and that the 37A unit as manufactured by Carrier "had more appeal to the industry, because it's narrower." He also informed Local 28 on this occasion that "we were not able to fulfill what we had talked about previously about making the plenum [sic] section in New York and we asked for consideration." Farrell took it "under advisement" but, until he died in 1972, Farrell "maintained his old position. He did not change."

After Farrell passed away, he was succeeded as president of Local 28 by Pasquinucci. Contardi soon

met with Pasquinucci and informed the latter that Carrier "couldn't make the unit as proven by evidence. We hadn't sold the job in several years." Then Pasquinucci answered he would appoint a committee to study the problem and come up with a recommendation, but that "until we had some kind of understanding" Carrier "could not bring the unit in." The unit as made was unacceptable in New York.

Pasquinucci did appoint such a committee and Contardi appeared before it in September 1972. Contardi demonstrated to them with an actual plenum section. He demonstrated to them that the way Local 28 wanted things done "they could see why it [the plenum made in New York] was leaking, they could see why we had the problems and that it was a bad deal." He "showed them how and why it leaked" when the plenum was manufactured in the New York area. Later the Local 28 committee made a recommendation which was presented to its executive board and gave Contardi a copy thereof. (G.C. Exh. 2, app. I). Said committee recommended "acceptance of Carrier Moduline variable system factory fabricated, leak tested, and calibrated."

In late November 1972, Contardi spoke to Pasquinucci, asking the latter "what he was going to do, inasmuch as he didn't get it by the executive board." Pasquinucci "felt this unit should be admitted to New York" as fabricated in Tyler, Texas, notwithstanding that the Local 28 executive board disagreed with him. In early 1973 Pasquinucci had one of the committeemen "make a presentation to the membership [of Local 28] at one of the union meetings in an effort to sell the membership on the idea" espoused by Carrier. But the membership turned down "the idea."

In August 1973, Carrier received an order for 37A units from its distributor, Carlton Stewart, for a job at the Van Etten Drug Treatment Center, as the architect and the engineer on this job and decided "to put Moduline on the job." Carrier's Baltimore office worked with said architect and engineer "for the design of the job." Three Boro was the sheet metal contractor on said job. In October 1973, Contardi complained to Dan Pasquucci of Local 28 that Dan "had refused to let them sketch the job," and that Dan "will not permit this unit to come into New York." Dan replied. "That's so." Such sketching was to be performed by a union mechanic who was a member of Local 28. Consequently a charge under Section 8 of the Act was filed by Carrier against Local 28.

In November 1973, Contardi and other representatives of Carrier met with Pasquucci to "discuss the problem." Pasquucci insisted that he "could not permit the unit to come in and suggested that [Carrier consider] sending into New York the cut pieces of the unit, deliver them to some shop in New York, which could take the cut pieces and put them together and make the units." Pasquucci further stated that ultimately, after Local 28 men "got the experience, . . . the entire unit would be made in New York." Later Contardi informed Pasquucci that Carrier "would not bring any units in for fabrication in New York."

Then in January 1974, Carrier shipped seven 37A units to the Van Etten Drug Treatment Center, and the remainder in February. In February 1974, Local 28 and Carrier arrived at an agreement that the Van Etten job should go ahead without interruption, that

Carrier would by March 15 "prepare an outline of what had been [agreed upon] in writing," and "it was understood we would not sign it until July 1st." Carrier did prepare such outline.

In May 1974, Pasquucci discussed with Contardi a job at Presbyterian Hospital. Pasquucci suggested he should reactivate the Local 28 committee, mentioned above, and that Contardi meet with it. Contardi met with that committee in late May and attempted to convince it that the plenum "was a minor portion of the work that they lost. The unit would . . . definitely increase the total volume of work for them," i.e., for Local 28. Apparently, no agreement was reached on such issue.

On July 1, 1974, Stack defeated Pasquucci in an election for the presidency of Local 28. Contardi met with Stack on July 19. Stack promised to review the situation with the executive board of Local 28 "and others" and would then "have an answer." A few days later Stack informed Contardi that Local 28 was "going to insist that [Carrier] go along with the agreement as written," i.e., "Local 28's agreement with the association."

On cross-examination, Contardi explained in detail how a plenum, as well as the entire unit of which it is a part, functions. Among other things, Contardi stated that the unit "can never work separate of the plenum . . . in order to give the guarantee that we give with that unit, we assemble part of the plenum with part of a section of the unit, called the control assembly." He also mentioned that a "plenum [is] used in practically every air-conditioning system, in one fashion or another."

Further, on cross-examination, Contardi testified that members of Local 28 did work on some plenums in the past made in New York by employers having contracts with Local 28 but not on plenums of the type known as 37A and 37B. These latter types and the units of which they were a part have always been made by Carrier in Tyler, Texas. But President Farrell of Local 28 claimed that such plenums should be made in New York. Farrell also brought charges against Carrier before the Joint Adjustment Board that Carrier was "bringing in a unit that shouldn't be brought in here," and that this violated the contract between Local 28 and an association to which Carrier belonged.

Then in November Farrell claimed Local 28 members should make the plenum on Carrier's 37P unit because the plenum was a "customary, traditional item made by the [Local] 28 men." Later Carrier and Local 28 agreed that Carrier would attempt to design the unit to be made in two pieces so that the plenum would be made in New York. Up to then it was Carrier's position that the unit was one piece and the plenum, as part of that one piece, was to be made somewhere else than in New York.

Further, on cross, Contardi testified that on the police office building job Triangle Sheet Metal fabricated and provided the plenum using plans and specifications supplied by Carrier. Later Triangle claimed said plans and specifications were incorrect. This was settled by Carrier's paying Triangle \$10,000 in addition to the regular contract price to "modify" said plenums. But Carrier made said payment only because it guaranteed to the New York police that said plenums would function and thus was responsible

for Triangle's errors in "not maintaining the tolerances" on such plenums. Such incorrect tolerances caused the units to be defective and to leak on the jobsite. So Carrier paid the \$10,000 to Triangle "to modify the boxes so we [Carrier] could fulfill the guarantee." Finally, on cross, Contardi testified that, although by reason of Carrier's fabricating the unit some work would be lost by members of Local 28 in the New York City area, there would be additional work, such as "additional duct work," for such members by reason of their installing the unit which "would more than offset the loss of the plenums."

On redirect examination, Contardi testified that the air-conditioning units installed at the World Trade Center were sold by Carrier. Notwithstanding that the plenum for such units was manufactured in Tyler, Texas, members of Local 28 installed said units at the Center. Also, Carrier has sold similar air-conditioning systems, as well as other types of systems in the New York City area, and the units thereof, "literally hundreds of thousands," including their plenums, were manufactured in Tyler, Texas. Yet members of Local 28 installed those systems in the New York City region "without question or problems with respect to who was to perform the work or fabrication of any aspect of that."

Raymond Skorupa, an architect, testified essentially as follows for the General Counsel. He was employed by Isadore and Zachary Rosenfeld as a project architect from 1972 to December 1974. He produced the drawings and specifications on the Van Etten Hospital job. (G. C. Exh. 2, app. P and particularly pp. 15B-19 and 20). These call for the use of Carrier

Moduline 37A units because they were recommended by the engineering firm of Henkins and Anderson and thereafter the owner approved the installation of such units.

On cross-examination, Skorupa testified "as far as I was concerned, it didn't matter where the unit for the plenum [or Van Etten Hospital] was manufactured, any part of it . . . I didn't care where any of the pieces were manufactured, as long as they met the criteria in the specifications." Nor did the specifications provide who was to fabricate any of the components for the unit or where the unit or its three components were to be assembled.

Another witness for the General Counsel was Lawrence Sturgis. An adequate synopsis of his testimony follows. He is president of Advanced Control Corporation, which manufactures items for the heating, ventilating, and air-conditioning industry. From 1966 to 1973 he was executive director of the promotion fund of the sheet metal industry. Said fund is interested in increasing work opportunities for members of Local 28. Prior to that he was a consulting mechanical engineer. Such an engineer designs a system which "has optimum operating advantage keeping down the costs" in heating, ventilating air-conditioning, plumbing, and electrical work."

As executive director of the foregoing promotion fund, Sturgis cooperated with a Local 28 committee which was studying variable volume air-conditioning units, one of which was Carrier's Moduline unit. According to Sturgis, a sketcher in the sheet metal industry is one "who does the complete layout and background [of] the structural, architectural, and

to some extent the plumbing and piping . . . work, in a given project, where it applies to the ventilation industry." Sketchers are members of Local 28.

In the fall of 1972 he asked President Dan Pasquinucci of Local 28 to appoint a committee to study the variable volume system, and Pasquinucci did so. Later Pasquinucci indicated to Sturgis that he had read said committee's report and looked upon it favorably. Said report is in evidence as General Counsel's Exhibit 2, appendix I, and its stated purpose is "To Evaluate the Carrier Moduline Variable Volume Unit." Said committee recommended unanimously "acceptance of Carrier Moduline variable volume system, factory fabricated, leak tested, and calibrated." Pasquinucci told Sturgis that he favored the committee report but had to obtain the approval of the executive board of Local 28.

Later in the fall of 1972 Sturgis met with the executive board of Local 28. He argued that "the variable volume system [be] brought into New York" because it would "increase the net amount of work that would be done by members of Local 28." Members of said board then questioned Sturgis about the possible "loss of work opportunity by not manufacturing the plenum box that is attached to the unit." Admitting such loss Sturgis contended that if the plenum was not made in New York "the variable volume system would more than make up for that particular loss." But Sturgis later learned that the board turned down his recommendation.

In early 1973 the Joint Adjustment Board, a group consisting of labor and management, and Sturgis discussed the Carrier Moduline system. He urged said

board to "adopt a favorable policy towards" the variable volume systems.

On cross Sturgis testified that, to his knowledge, Local 28 "always" fabricated the plenum or the box in a unit. But he added that such plenums differed from those in a 37A "both in the controls that are placed inside the unit and the function that it serves." In his discussions with President Pasquucci of Local 28 Sturgis agreed that a plenum was a box, but disagreed that it was a routine box and insisted that "the variable volume system was far more sophisticated as a unit than the normal plenum above a linear diffuser." However, it made no difference to Sturgis whether the components of the variable volume boxes were made in New York, Texas, "or any place else," or if the plenum was made in New York and the other parts elsewhere.

Additionally, on cross, Sturgis testified that he appeared before the Joint Adjustment Board, a group composed of employers and Local 28, to "modify or amend" his agreement, i.e., "to try to have them waive the claims that the work was done historically" by Local 28. (G.C. Exh. 2, app. W-1.) But on that occasion he contended before the Joint Board that "the variable volume unit [i.e., the whole unit, including the plenum box] is obviously a relatively new item in the industry. There is nothing historical or traditional about it. . . . I didn't ask that something historically and traditionally made by 28 be not made" by Local 28. Finally, on cross, Sturgis asserted that prior to the introduction of the Carrier Moduline unit Local 28 had not made a box which was cut and fabricated in such a manner that a

control and assembly, such as that used on a Carrier unit, could be attached; but there are now about 10 shops in the New York City area which are producing comparable boxes.

Howard Bretz, a member of Local 28 and a sheet metal draftsman for Triangle Sheet Metal, testified substantially as follows for the General Counsel. He is also a sketcher. A sketcher prepares shop drawings on the drawing board. About 6 years ago President Farrell of Local 28 appointed him to its research and review committee to make a study of variable volume systems. Such study, which was undertaken in 1972, was suggested by Larry Sturgis of the industry fund. Then said committee issued a unanimous report recommending "acceptance of Carrier Moduline variable volume system, factory fabricated, leak tested, and calibrated." (G.C. Exh. 2, app. I, p. 1.)

Such report was then presented to executive board of Local 28 on October 12, and again on November 21, 1972. On the latter date the said committee recommended that Local 28 accept Carrier's request that Local 28 waive a provision of said union's "standard form of union agreement to fabricate the boxes, the plenums." This recommendation would cause some loss of work to Local 28 members but would result in additional other work which would more than offset said loss of work. But the executive board made no decision respecting this proposal at that time. Said board met again on June 5, 1973, and further studied the problem. On this last occasion the board rejected the committee's proposal.

At a general membership meeting after said June 5 rejection, Bretz objected to acceptance of the board's

position, and recommended "two pilot jobs to see if this [the committee's proposal] was a workable solution." But the members at said meeting accepted the board's recommendations and rejected those of the committee.

Another witness for the General Counsel, Joseph Reyes, declared under oath substantially as follows: He is president of Acme Climate Control Corporation, which is engaged as a contractor in heating, ventilating, and air-conditioning. Acme received a contract on October 1, 1973, from Ormar Construction Company to work on the Van Etten Drug Treatment Center. (G.C. Exh. 2, app. R.) Subsequently, on December 6, 1973, Acme made a contract with Three Boro Company, the "Party to the contract" in the instant case (G.C. Exh. 2, app. T), but this contract was preceded by an understanding dated October 8, 1973.

Sometime in October 1973, Acme commenced performing work at the foregoing jobsite. Originally the sketches pertaining to Acme's work required the installation of Carrier's Moduline units. One day, following a conversation with Ted Johansmeyer, a sketcher on the job employed by Three Boro, and who was a member of Local 28, Reyes observed that the Carrier Moduline units had been erased from the tracing or sketch. Johansmeyer told Reyes that he had made said erasures. Reyes assumed that Johansmeyer had prepared the sketch originally with the Moduline units drawn in.

On February 15, 1974, Reyes wrote to Three Boro that "all of the Carrier Moduline units are ready for delivery . . . to the [Van Etten Drug Treatment

Center] job." (G.C. Exh. 16.) On February 21, 1974, Three Boro replied by letter to Acme that Carrier's Moduline units contained plenums "which is not in our proposal . . . of October 8, 1973," and that said proposal "is in conformance with our signed contract agreement with "Local 28. (G.C. Exh. 17.) Then on February 25, 1974, Acme wrote to Three Boro, "it is our understanding that all differences have been resolved between Local 28 and Carrier Corporation insofar as the installation of Carrier Moduline units for [the Van Etten Drug Treatment] job. . . . Based on this agreement you have agreed to proceed with the installation of these [Carrier] units." (G.C. Exh. 18.)

Acme's purchase order for such Carrier units is set out in General Counsel's Exhibit 2, Appendix 5. Said order involves, according to Reyes, complete units "with the plenum box attached." At no time did Acme make arrangements or agree to have any component part, such as the plenum, of the Carrier Moduline units to be fabricated "somewhere else" than Carrier, such as by Three Boro.

Daniel Fragnito, another witness for the General Counsel, gave testimony substantially as follows: He is Carrier's engineering section manager for the Moduline units manufactured in Tyler, Texas. The first 37P Moduline unit was installed in 1961 in a high school in Beaumont, Texas. In 1970 he visited Essex Sheet Metal Company's shop in the New York City area "to look at a plenum" in connection with a job involving Staten Island Community College in New York City. Essex, which recognizes Local 28 and has a contract with it, made a plenum for Car-

rier's Moduline unit. What he saw "didn't have a chance in the world of working" because it could not satisfactorily be "mated" with Carrier's Moduline unit, and he explained this to Essex.

Fragnito in 1969 provided a special design of the Carrier Moduline 37P unit for the New York police headquarters job. Triangle Sheet Metal Company called on him at Carrier's Syracuse, New York, laboratory, in December 1970, to "check out the installation procedure of the unit" in a "mock-up installation" of the unit. Such "mock-up" presented "some problems at the time of installation" which demonstrated "it was very difficult to insure . . . a proper . . . air seal." Further, he testified that on the Moduline 37A unit "it is much more difficult to put on [the plenum section] separately," i.e., "it is better for [Carrier] to produce the whole thing [in Tyler, Texas] than to have some of it produced by [Carrier] and some of it [the plenum] by someone else."

Continuing, Fragnito explained why it was almost necessary, and certainly better, for Carrier to make the plenum in Tyler, Texas, rather than have outsiders in New York fabricate it. In this connection, he mentioned that those in Tyler, Texas, including "supervisory and management people," fabricating such units receive special training to qualify them to manufacture such units, and that the plant there is specifically designed to manufacture units with the plenum included in the units. In fact, according to him, "it would be extremely difficult" to "mate the plenum boxes to the controls" if the plenums are manufactured outside of Carrier's Tyler, Texas plant."

Finally, on direct, Fragnito testified that patents cover Carrier's Moduline units 37A and 37P, and that the plenum cannot be produced in the "Local 28 shops" without obtaining permission from Carrier as the holder of such patents. The Staten Island job, the New York police headquarters job, and perhaps "one or two other minor jobs" had their plenums made by a manufacturer in the vicinity of New York City under a license from Carrier as the patent holder. Except for those jobs mentioned in the preceding sentence no other manufacturer than Carrier had made Moduline units 37A or 37P.

On cross, Fragnito testified that Carrier received complaints that the Moduline units installed on the New York police building job and the Staten Island job were not functioning properly. Also, on cross, he testified that the special training and equipment connected with Carrier's Tyler, Texas, plant could be effected elsewhere "as long as they were within the manufacturing plans of Carrier . . . and as long as [non-Carrier manufacturers] had the backup information and the backup personnel."

Further, on cross, Fragnito stated that on the New York police headquarters job all the parts of the unit, but the plenums were manufactured by Carrier in Tyler, Texas, that the plenums were fabricated by Triangle in the New York City area, and that Triangle assembled all of said parts at the jobsite to produce complete units. He gave the same answer with respect to the Staten Island job on which Essex installed the Moduline units, i.e., Essex fabricated the plenums and assembled the entire unit on the job, although Carrier made parts other than the plenums.

But, according to Fragnito, Triangle fabricated said plenums differently from the way Carrier did, so that complaints about leaks were received by Carrier. Such complaints were submitted to Carrier because it guaranteed the entire unit.

At this point in the hearing, the parties stipulated that Carrier Moduline units 37A and 37P are sold throughout the United States and that such units, including the plenum portion are installed as fabricated in Carrier's Tyler, Texas, factory by members of locals of Sheet Metal Workers International Association without objection, except in that area within the jurisdiction of Local 28. Examples of such installations are shown in General Counsel's Exhibit 8 with deletions therein for installations in New York City.

It was further stipulated that on or about March 3, 1975, members of Local 28 employed by General Sheet Metal, Inc., began installation of Carrier 37af Moduline units at Babies Hospital addition, pursuant to an agreement (G.C. Exh. 2, app. Y) between General Sheet and H. Cohan Contracting Corp.; that the Joint Adjustment Board on or about March 5, 1975, discussed charges (G.C. Exh. 2, app. aa) brought against General Sheet; that no final action was taken on the resolution (G.C. Exh. 2, app. bb) of Local 28 at said meeting or on any other disposition of said charges.

Then the General Counsel rested.

B. Respondent's Defense

Dan Pasquinucci was Respondent's first witness. His testimony may be condensed as follows: He is

now an organizer for Sheet Metal Workers International Association. Previous to that he was a business agent and then president of Local 28. He served as such president from April 1972, until June 30, 1974. In September 1972, he discussed Carrier's Moduline units with Larry Sturgis, the executive director of "the industry fund." Sturgis said he was interested in promoting such units in New York City as he felt "it meant an additional amount of work for the membership of Local 28." Dan replied he was interested if it meant more work to the "shop men" of Local 28, "but it meant a modification of our collective-bargaining agreement" because "we had members of Local Union 28 fabricating a similar box" for the last 15 years. So Dan said that the Local 28 executive board would have to approve the Carrier Moduline unit because of the said provision in said union's bargaining contract. Dan promised to submit the question to the research and review committee of Local 28 for further consideration.

Later Dan submitted the issue to the aforesaid committee of Local 28. Said committee submitted a report to him recommending "acceptance of Carrier Moduline variable volume system." (G.C. Exh. 2, app. i.) He concurred in the committee's views, and presented such report to the executive board of Local 28, informing said board he went along with the committee's recommendation. He told the board that "it would bring extra work into Local Union 28 . . . [although] it was in violation of our [collective-bargaining] agreement." But the board disapproved the committee's recommendation that Carrier, and not employers having contracts with Local 28, fabricate the plenums. (G.C. Exhs. 5 and 6.)

Shortly after December 6, 1972, Dan informed Sturgis of the board's rejecting the committee's recommendation of Carrier's fabricating the plenum on Moduline units. Then Sturgis appeared before the board in February 1973, but after discussing the problem with him the board concluded it would adhere to its position but suggested that Sturgis present the problem to the Joint Adjustment Board.

Sturgis did appear before said joint board and suggested a "pilot project . . . to see if . . . it would bring more work into the Local." Local 28 representatives present promised to refer the question of a pilot project to their executive board. Such question was given to the said executive board about April 1973. However, such executive board later rejected said proposal of Sturgis. (G.C. Exh. 6.) Thereafter, Pasquinucci communicated to Sturgis the fact that such proposal had been rejected by the executive board.

In October 1973, Contardi called Pasquinucci to tell him that the sketcher on the Van Etten job had refused to sketch the job. Pasquinucci replied, "I was just going to live under my contract" but added that he "wasn't going to stop any jobs." Later, Pasquinucci met with Contardi in December 1973 to attempt to resolve their differences. But nothing was accomplished. Then Pasquinucci held another meeting with Contardi in February 1974, "to see if we couldn't resolve the Van Etten job." It was agreed, among other things, that "Carrier Corporation would withdraw from selling the Moduline unit until we had resolved our differences." On March 12 Contardi gave Local 28 a written proposal embodying a

solution of their differences. (G.C. Exh. 2, app. U.) Pasquinucci promised to submit this proposal to the executive board of Local 28 after July 1.

In May 1974, Pasquinucci told Contardi that he had been notified that some Carrier salesmen were promoting the Moduline unit on certain jobs in New York City, and added that he felt that this was in violation of their oral agreement made in February 1974. Contardi agreed to look into this.

Fred Zwerling, president of Triangle Sheet Metal Corporation and its subsidiary, Moduline Metal Corporation, testified substantially as follows as a witness for Local 28. Triangle performed, among other things, the air-conditioning work on the New York City police headquarters building. This included installing the Moduline unit 37P for such headquarters. At the time Triangle bid on said job "there was an understanding between Carrier, the City, the design engineer, and Local 28 that the plenum portion of the unit would be fabricated by Local 28 in New York City." So Triangle purchased the Moduline section of the unit from Carrier, and Triangle "manufactured the plenum to fit that unit."

Then Triangle fabricated said plenums in its plant at College Point, Queens, by employees belonging to Local 28. Triangle had made plenums "similar or compatible to this . . . many times" prior to this. "It was very simple sheet metal work." Then Triangle assembled at the jobsite the portion of the unit which Carrier furnished with the portion furnished by Triangle, using members of Local 28 for such purpose. Such assembling was "no more difficult or more complicated than many other jobs [Triangle] had done."

Triangle started the police job in 1970 and completed it in 1974. No unusual problems "with the operation or installation of these units were encountered."

Prior to installing the units Triangle ran some tests on them and discovered some leakage of air from the plenum Moduline combination which Zwerling claimed resulted from Carrier's improper fabrication. So Triangle called "this defect" to the attention of Carrier. See Resp. Exh. 4. Carrier advised Triangle how to correct this. See Resp. Exh. 5 and 6. However, this involved "additional expense and cost to Triangle." This cost was submitted to Carrier (See Resp. Exh. 7) and the latter made a "settlement" thereof. See Resp. Exh. 8. After the units were installed, they were tested "with respect to their air distribution in the unit and these disclosed that "the building was working satisfactorily, and accepted by the owner for occupancy." Carrier guaranteed the operation of that portion of the Moduline unit which it furnished.

On cross Zwerling testified that, prior to the police building job, Triangle never manufactured plenums for Carrier's Moduline units, and that "the only time that Triangle has ever fabricated plenums in relation to Carrier's Moduline unit was the Police Headquarters job." He also asserted on cross that his company has never installed any Carrier 37A model units at any place.

John J. Flannery, for 17 years president of J. J. Flannery, Incorporated, a sheet metal contractor, was a witness for Respondent. His testimony may be summarized as follows. Prior to this he was a sheet metal estimator of Howard Platter Co. for 5 years.

This latter position required him to prepare bids on heaters, ventilators, air-conditioning, and kitchen exhausts. J. J. Flannery, Inc., subcontracts work for mechanical contractors in the field of sheet metal work, outlets, sound traps, and the work "necessary to take care of the air side in a high pressure or low pressure air-conditioning job."

About 5 years ago J. J. Flannery, Inc., first "performed any work with regard to the Carrier moduline units" when it made 1300 or 1400 boxes for the Bache & Co. job in New York City but did not install them. Actually the boxes were fabricated for Alvord & Swift, the mechanical contractors on the Bache job. These boxes were "the plenum section from the top" on 37P units. Employees who were members of Local 28 drew the sketches and fabricated said boxes. In the past J. J. Flannery, Inc., has fabricated "similar" or "comparable" boxes "to this plenum."

J. J. Flannery, Inc., also, about 2 or 3 years ago, made about 30 or 40 Carrier 37P plenums for Alvord & Swift as part of the duct system at the Presbyterian Hospital's Harvest Pavilion. On this job Flannery, Inc., assembled at its shop the said plenums Carrier units which Flannery purchased without the plenums, and then installed the entire units with the plenums included therein at the jobsite. The plenums for these units on this job were fabricated and assembled and then the unit was installed at the jobsite by members of Local 28 employed by Flannery, Inc. Since said unit "was a new item and they [Carrier] were concerned about it [Carrier] checked it out and said it was fine."

Flannery, Inc., received no complaints from Carrier as to the plenums on the hospital job or from anyone as to the Bache job or the hospital job.

About a year and a half ago Flannery, Inc., received an order from Alvord & Swift to perform more of the same kind of plenum work at said Hospital's Vanderbilt Clinic. "It was all part of the same complex at Presbyterian Hospital." This involved the same unit, i.e., Moduline 37P of Carrier, and "essentially the same" plenum fabricated for the Harvest Pavilion. Said plenum was assembled as part of the unit, the remainder, i.e., all but the plenum, having been supplied by Carrier. Said units were assembled by members of Local 28 in Flannery's shop and then installed on the jobsite by members of Local 28. Said Vanderbilt job was tested and said test disclosed that "minor corrections as to the air quantity" had to be made. After said corrections were completed "the system was ultimately approved."

The foregoing jobs were the only ones on which Flannery, Inc., worked which involved Carrier's Moduline units.

On cross Flannery was unable to say whether the foregoing Bache job involved Carrier units, and "it could have been some other unit." Further, on cross, he averred that Flannery, Inc., never made a box or a plenum for a Carrier 37A unit. Finally, on cross, Flannery stated that he wasn't sure how many units his company installed on the hospital's Harvest Pavilion job.

Thomas Berrill, president of a sheet metal contractor, Lambert Sheet Metal Corp., testified for Re-

spondent. He has been a dues-paying member of Local 28 since 1941. An abstract of his testimony follows: He is not familiar with the Carrier Moduline unit. Lambert Corp. did a job at Columbia Presbyterian Hospital installing Buensod's "variable volume system specified in that contract." Alternates to Carrier's Moduline units are those of Arastack and also of Buensod. The contract included a "reference to a Carrier Moduline unit or an alternate." Lambert "bid the alternate," which was Buensod's.

A variable volume system "is a system where you get through a thermostat a variable amount of air, or more air or less air as the occasion requires . . . it is done by a thermostat that controls the volume regulator." Carrier's Moduline units, Buensod's versa-trol system, and Aeronca's versa-trol system will perform that function. On a versa-trol system the plenum is attached to a "line diffuser, or a regular diffuser, and it is controlled automatically throughout the thermostat by air."

In Berrill's opinion the system of Buensod is similar to Carrier's, in that Buensod's has a plenum, "To [him] it looks very similar," although he had no experience in or knowledge in installing a Carrier unit. In his opinion "the plenum of the Carrier system [is] similar to the plenum in the Buensod system"; and although he described one difference, he was unable to state what other differences existed between the two systems. Members of Local 28 have fabricated Lambert's plenum boxes, as Lambert has a collective-bargaining contract with said union.

Lambert also has shipped variable volume units with plenum boxes to other jobs but did not install

them. On these occasions the contractor on the job installed such units. However, such units lacked diffusers, as "we don't make diffusers." But he did not know where such contractors obtained such diffusers for the variable volume units.

On cross Berrill stated that Lambert never fabricated a plenum which "had anything to do with the Carrier 37A or 37P unit." Also on cross he asserted that Lambert is the exclusive manufacturer in New York City of Buensod's plenums. Finally, on cross, Berrill testified that the specifications in the contract on the Columbia Hospital job "called for the Carrier Moduline Unit or an alternative." However, he did not know how an alternate to Carrier's unit was selected as the mechanical contractor, for whom Lambert was the sheet metal work subcontractor, made that decision.

Another witness for Respondent was Jack McKeogh, manager of Essex Metal Works. A summary of his testimony is set forth here. Essex performs sheet metal work, air-conditioning, and sheet metal fabrication installation. In 1970 Essex "performed work in regard to the 37P unit" of Carrier. It did so as a subcontractor to CDE Mechanical Contracting Company on the Staten Island Community College in New York. Essex furnished and installed plenums on this job. The "furnishing aspect consisted of "fabricating a sheet metal plenum, installing it on the module in the shop, and then delivering the module to the jobsite. The module was shipped to the Essex shop by CDE, which bought the same from someone whose name is not in the record.

While the module was in the Essex shop Essex drew sketches "of the application of the plenum to

module." See Resp. Exh. 10 for such a sketch or drawing. Then the plenum was fabricated in the Essex shop by its employees. Said employees were members of Local 28. After this the plenums were assembled on the module in the shop. A Carrier representative came to the shop "to approve the type of fabrication [Essex was performing] on the unit." After this Local 28 field men installed the units at the jobsite. CDE tested and approved the installed units. But Essex did not give a warranty or guarantee "involving the installation." However, it never received any complaints as to the operation of functioning of said installed units.

On cross McKeogh asserted that the Staten Island job was the only occasion on which Essex "performed any work in relation to the Carrier Moduline units."

Edward Stack, president of Local 28 since July 1974, was another witness for Respondent. An adequate condensation of his testimony follows. He was a business agent for Local 28 for slightly more than 7 years prior to becoming its president. In July 1974, Contardi of Carrier requested Stack "to implement the agreement between Local 28 and Carrier . . . regarding the . . . rise of the Moduline unit in the City of New York," said agreement having been mailed about March 12 to President Pasquinucci of Local 28. Stack promised "to review it." When Contardi telephoned Stack a few days later, Stack informed him that Local 28 "remained consistent with its agreement." Said agreement was between Local 28 and the Sheet Metal Contractors Association as well as some independent sheet metal companies.

At this point Respondent rested.

C. General Counsel's Rebuttal

Augustus Contardi's testimony as a rebuttal witness is briefly set forth here. He visited the completed Bache & Co. job at Pearl and Gold Streets in Manhattan, New York City, already mentioned above by other witnesses, on March 14, 1975. Carrier did not sell Moduline 37A or 37P units for said Bache & Co. job. Further there are no variable volume units on said job, regardless of whether Carrier or anyone else manufactured them.

At this point both parties rested except for the right to introduce further evidence on an incident which occurred at a job during the hearing. The case was continued for this limited purpose to April 15, 1975.

D. The Resumed Hearing on April 15, 1975

At the hearing on April 15, 1975, the parties entered into the following written stipulation. (G.C. Exh. 20.) Immediately after the meeting of the Joint Adjustment Board on March 7, 1975, Morris Lipka, president of General Sheet Metal Works, Inc., instructed members of Local 28 to cease, and they did cease, installing Carrier Moduline units on the Babies Hospital Addition job. On or about March 17, 1975, Lipka met with President Stack of Local 28, and advised Stack that General Sheet would pay \$2,153.60 to the Local 28 sick dues relief fund as set out in said Local's proposed resolution as found in General Counsel's Exhibit 2, appendix BB. (Said proposed resolution accused General Sheet of "permitting work covered by our Agreement—fabrication of plenums—involving the Carrier Dual Modu-

line unit for installation at the Presbyterian Medical Center, Babies Hospital . . . to be performed by persons who are not within the bargaining unit covered by our agreement . . . Resolved that General Sheet . . . make payment of the sum of \$2153.60 to the Local 28 sick dues relief fund, representing the loss of hours caused by General's said violation . . . 160 hours at the rate of \$13.46 per hour.")

Said stipulation further provides that Stack told Lipka that said charges would be settled; that General Sheet paid said \$2,153.60 about March 20 and resumed installation of said units; and that about March 21 Stack wrote to General Sheet a letter confirming the terms of the above settlement. Said letter is attached to the stipulation.

In addition, Augustus Contardi testified substantially as follows for Carrier, the Charging Party herein. About March 14, 1975, Ed Simek of Colonial Mechanical, accompanied by Morris Lipka of General Sheet, met with Contardi to discuss the fact that General Sheet had stopped working on the Babies Hospital job. Lipka stated he had stopped the working on said job because General Sheet had been brought up on charges and was subject to a fine. Simek stated he "could not tolerate the pressure." Consequently, Contardi stated to Lipka to settle the charges with Local 28 and Carrier would reimburse General Sheet for the amount assessed by Local 28 on such charges. Carrier did later so reimburse General Sheet. (Charging Party's Exh. 1 and 2 for General Sheet's request for such reimbursement.)

IV. CONCLUDING FINDINGS AND DISCUSSION

In arriving at the findings set forth below I have observed the following applicable principles of law: (a) the burden of proof is upon the General Counsel to establish his case, and this obligation remains with him during the entire hearing. A corollary is that no burden is imposed upon Respondent to disprove any of the allegations pleaded in the complaint. (b) Failure of the Respondent to establish any one or more of its defenses does not amount to affirmative evidence aiding the General Counsel in proving his case. (c) As hereafter recited, I have not credited Respondent's evidence on some aspects of the case. But this does not contribute to the General Counsel's burden of proving his case. *N.L.R.B. v. Harry F. Berggren & Sons, Inc.*, 406 F.2d 239, 246 (C.A. 9, 1969); *Ri-Del Tool Mfg. Co., Inc.*, 199 NLRB 969, 973 (1972). "The mere disbelief of testimony establishes nothing." *N.L.R.B. v. Joseph Antell, Inc.*, 358 F.2d 880, 883 (C.A. 1, 1966).

A. *The Collective-Bargaining Agreements Between Local 28 and Three Boro and Sheet Metal Air Conditioning Contractors Association*

I find that Three Boro and the association each has a collective-bargaining agreement with Local 28 which contains a no-subcontracting clause which contravenes Section 8(e) of the Act. This is because I find not only that said clause (G.C. Exh. 2, app. E, p. 40) on its face contravenes Section 8(e) of the Act, but also because Pasquinucci as president of Local 28 told Contardi of Carrier that Carrier could not bring its Moduline unit into the New York City area until they had some kind of understanding.

Even after a committee of Local 28 unanimously recommended that Carrier's Moduline unit be accepted in the New York area because such units would create more work for members of Local 28, such recommendation was turned down by both the executive board and the membership of Local 28. As Pasquinucci credibly testified on this phase of the case, the executive board of Local 28 was not willing to modify the collective-bargaining agreements of Local 28 in relation to the fabrication of plenums.

In this connection I find, crediting Contardi, that President Farrell of Local 28 stated that Carrier's units manufactured in Tyler, Texas, "could not come into New York" unless the plenum section thereof was manufactured in New York in a shop which had a collective-bargaining agreement with Local 28. And I also find that Carrier was also "brought up on charges within" the Mechanical Contractors Association, to which it belonged. Later still Farrell objected to Carrier's Moduline unit being installed on the New York police office building job because the plenum for such unit was being fabricated in Tyler, Texas.

Also, Dan Pasquinucci, as president of Local 28, admitted to Contardi that, on the Van Etten Drug Treatment Center job he, Pasquinucci, had refused to let members of Local 28 "sketch the job" and "would not permit this unit [i.e., Carrier's Moduline unit] to come into New York." Yet the owner of said building had decided to install Carrier's Moduline unit at said treatment center and his architect had so provided in the specifications submitted to contractors who bid on it. Three Boro was the air-conditioning subcontractor on said job, but its sketch-

er, Johansmeyer, a member of Local 28, erased from the blueprints the use of Carrier Moduline units. When Contardi complained of this to Pasquinucci the latter stated that he would not permit this unit to come into New York. I find no right of control by Three Boro over the type of unit or its composition to be used on this Van Etten job.

Another instance of a violation of Section 8(e) of the Act is the Babies Addition to the Columbia Presbyterian Hospital. Here again I find no right of control in the subcontractor, General Sheet Metal, Inc., so that Local 28, with whom it had a contract as a member of the association, had no lawful right to insist that General fabricate the plenums, especially since the building owner's specifications called for an installation of Carrier's Moduline units. And I further find, as contended by the General Counsel, that such specifications "contemplated that the work of fabricating such plenums would not be done by sheet metal contractors."

Also, I find that the charges filed by Local 28 against General with the Joint Adjustment Board cannot be upheld by Section 8(e) of the Act, since the provisions in the collective-bargaining contract between Local 28 and the Association forbidding subcontracts allowing plenums to be fabricated outside of New York are not lawful. Cf. *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). In said *Connell* case, the Supreme Court held, "We conclude that Section 8(e) does not allow this type of agreement."

In this connection I find that said clauses in the contracts of Local 28 were not to preserve work for

its members but their tactical object was to obtain benefits, i.e., fabricating plenums, for members of Local 28 which were being enjoyed by Carrier's employees in Tyler, Texas. See *National Woodwork Manufacturers Association et al. v. N.L.R.B.*, 386 U.S. 612, 644, 645 (1967).

Moreover, I find that the Carrier Moduline unit is a new and different product and that fabrication and installation of these special units is not work traditionally and historically performed by on-site sheet metal workers belonging to Local 28. And I further find that Local 28, by applying the aforesaid work preservation clause, "was trying to acquire work performed by employees" of Carrier in Tyler, Texas. See *Associated General Contractors of California, Inc. v. N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975). And I find that Local 28 used coercion to attain said objective, said coercion being not only the refusal of its members to install said units but also the filing of charges by Local 28 against employers signatory to contracts with it. One of such charges resulted in one employer's, General Sheet, paying \$2,153.60 to the Local 28 sick dues relief fund.

As the Ninth Circuit Court of Appeals pointed out in the above *AGC* case, "Inevitably, no subcontractor who is bound by a provision of the type involved here will install prefabricated [products] unless he has an agreement that he will be reimbursed for assessments and other sanctions levied against him. This practice will influence the business decisions of hospital builders." 514 F.2d at 439. This language is equally applicable to the hospital builders in the instant case, and I so find. And I further find that

the construction industry proviso to Section 8(e) of the Act is not applicable because "the disputed work," i.e., the plenums, "was done off the jobsite at the plant of [Carrier] in another State." See 514 F.2d at 439. In my opinion, I consider distinguishable and, therefore, not requiring a contrary conclusion, the recent case of *United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, and Its Agent, Southwest Building Trades Council (Summit Valley Industries, Inc.)*, 217 NLRB No. 129 (1975).

Crediting the General Counsel's evidence, and not crediting Respondent's evidence to the extent it is not consonant with the General Counsel's, I find that pursuant to an agreement between Local 28 and Carrier applicable to the police office building job, the work of fabricating plenums for Carrier's Moduline units for said job was given to Triangle, which employed members of Local 28. But Triangle did not prepare said plenums properly, so that Carrier, having guaranteed the entire unit, suffered about \$10,000 in additional costs to render the units properly workable. As noted above, I have found the pertinent clause in the Local 28 collective-bargaining contract violative of Section 8(e) of the Act. However, assuming such clause not unlawful as worded, I find that under the circumstances, i.e., the inability of Triangle and other subcontractors such as Essex Metal Works, to fabricate a workable plenum demonstrates that Carrier was unable to obtain any orders for Moduline units if plenums therefore were to be fabricated separately by others than Carrier. Indeed a Local 28 committee so found in a report it submitted to said union. (G.C. Exh. 2, app. I.) And

the testimony of Larry Sturgis, which I credit, concurs in said committee's report.

Further, I find that the Local 28 executive board on May 30 and June 5, 1973 (GC. Exh. 6), voted that "no allowance in [collective-bargaining agreements] be made to allow the dual Moduline Mixing Box in the New York City area." This also depicts coercion on the part of Local 28, assuming that coercion must be shown to demonstrate that the sub-contract clause is invalid under Section 8(e) of the Act. Of course this occurred more than 6 months before the late charge against Local 28 was filed, so that it cannot be found to constitute an unfair labor practice. But it demonstrates that Local 28 was doing more than merely preserving work, as it shows that it was compelling Carrier, a Tyler, Texas, manufacturer, to produce its Moduline units without a plenum.

It is also of some, but not conclusive, significance that the entire Moduline unit, including its plenum, is not only manufactured in Tyler, Texas, but also that several patents cover the separate parts which compose the unit. It would seem that Carrier's right to fabricate the entire unit is assured by said patents, and that the efforts of Local 28 to cause Carrier to surrender such patent protection to others with whom Local 28 has a collective-bargaining agreement is not a right conferred upon Local 28 by the National Labor Relations Act. Cf. the Supreme Court's decision in the *Connell Construction Company* case, *supra* where it was held that the said labor relations Act does not authorize unions to violate the Federal antitrust laws.

Further, I find that, on the evidence which I credit, some of which is set out in the Local 28 committee's report, Local 28 members will not lose any work if Carrier continues to manufacture the plenums for its Moduline units. And the record fails to disclose that Local 28 members have traditionally or historically fabricated these Carrier plenums over an extended period of time in the past. The two times when Local 28 members produced Carrier's plenum not only fail to rise to the stature of tradition or history but also arose only because Carrier consented thereto as an effort to settle the dispute with Local 28.

B. The 8(b)(4) Violations

1. As to Section 8(b)(4)(i)(B)

This subsection, so far as material herein, forbids a labor organization from inducing an employee to refuse to perform services for his employer where an object thereof is to force or require any person to cease doing business with any other person. I find that the Respondent has violated this subsection.

In this connection I find, crediting Contardi, that Dan Pasquinucci, the president of Local 28, admitted to Contardi in October, 1973, that Dan "had refused to let [Local 28 members] sketch the [Van Etten] job" and that Dan "will not permit this [Moduline] unit to come to New York." I find that Pasquinucci's conduct constitutes inducement or encouragement of employees where an object thereof is to have contractors refuse to do business with Carrier, i.e., contractors would be unable to use Carrier's Moduline unit. And I further find that this violates Section 8(b)

(4)(i)(B) of the Act. One of the employees so induced was Ted Johansmeyer, a member of Local 28 and a sketcher for Three Boro on the Van Etten Drug Treatment Center job.

Further, I find that the executive board of Local 28 made a decision to refuse Local 28 members the right to install Carrier's Moduline units (G.C. Exh. 5) and that this decision was adopted by the membership of Local 28. This amounts to inducement or encouragement, and I so find, and I further find that an object thereof is to force or require contractors not to do business with Carrier by purchasing or using Carrier's Moduline units.

2. As to Section 8(b)(4)(ii)(B)

In essence this part of the Act prohibits a union from threatening, coercing, or restraining any employer where an object thereof is to force or require any employer to cease doing business with any other employer. I find that Respondent did engage in conduct, set forth below, which violated this subsection of the Act.

a. Crediting Contardi, and not crediting Dan Pasquinucci, I find that the latter informed Contardi in October 1973, that Pasquinucci had refused to allow Local 28 members to sketch the Van Etten Drug Treatment Center job and that he would not permit Carrier Moduline units to come into New York. This, I find, constitutes coercion, an object of which is to force or require Three Boro to cease doing business with Carrier. The architect and the engineer on this job had decided "to put Moduline on the job," and Three Boro as the sheet metal contractor was to install Moduline units.

b. In November 1973, Dan Pasquinucci told Contradi that Dan insisted that he "could not permit the [Moduline] unit to come in" to New York. This, too, contravenes the subsection of the Act which is discussed at this point.

c. In July 1974, President Stack of Local 28 informed Contradi that said Union "was going to insist that [Carrier] go along with the agreement as written," i.e., "Local 28's agreement with the Association." It is my opinion, and I find, that Stack's statement is coercive and is intended to force Carrier to change its methods of manufacturing Moduline units by not making plenums for its Moduline units. It is coercive as to Three Boro and other employers in the Association. I find that such statement contravenes the subsection of the Act here under consideration.

d. Finally, I find that it is not necessary that a complete cessation of business dealings occur to find a violation. It is sufficient that Respondent's conduct causes Carrier to alter its Moduline units by delivering them without plenums. Thus, I find that Respondent interfered with Carrier's process of delivering complete Moduline units and prevented contractors doing business with Carrier from obtaining such complete units. Cf. *Retail Clerks Union, Local 770, AFL-CIO, and Retail Clerks International Association AFL-CIO*, 145 NLRB 307, 311-312 (1963). And see *Retail Clerks Union, Local 1428*, 155 NLRB 656, 659-660 (1965); *Local Union No. 26, Sheet Metal Workers Association, AFL-CIO, and Sheet Metal Workers International Association, AFL-CIO*, 168 NLRB 893, 895, 899-900 (1967).

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Those activities of Respondent set forth in section IV, above, found to constitute unfair labor practices, occurring in connection with the operations of Carrier described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices it will be recommended that it cease and desist therefrom and that it take certain affirmative action, described below, designed to effectuate the policies of the Act.

On the record as unfolded at the hearing, I am unable to find that Respondent has demonstrated any general hostility to the Act. Accordingly I find that an Order prohibiting Respondent from committing the conduct herein found to contravene Section 8(e) and 8(b)(4)(i) and (ii)(B) of the Act will effectuate the policies of the Act, and that an Order broader in scope is not warranted. Cf. the Board's Order in *Sheet Metal Workers International Association Local No. 150*, 170 NLRB 772, 774 (1968).

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent Local 28 is a labor organization within the meaning of Section 2(5) of the Act.

2. Carrier and the other employers involved in this case are employers within the meaning of Section 2(2) of the Act. Carrier is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
 3. By its conduct in enforcing articles 4(b) and 16 of the collective-bargaining contract between Local 28 and Three Boro and similar clauses in the collective-bargaining contract between Local 28 and the Association, Local 28 has engaged in unfair labor practices within the meaning of Section 8(e) of the Act.
 4. By coercively refusing to allow employers with whom Local 28 has collective-bargaining contracts in the New York City area to install Moduline units unless said units lacked Carrier's plenums. Local 28 engaged in unfair labor practices within the meaning of Section 8(b) (ii) (B) of the Act.
 5. By Pasquinucci's refusing to allow Local 28 members to sketch the Van Etten job and his not permitting Carrier's Moduline unit to come to New York City, and by the Local 28 executive board's decision to refuse to allow said units to be installed in the New York City area, said decision being adopted by the membership of said Local 28, Respondent engaged in unfair labor practices within the meaning of Section 8(b) (i) (B) of the Act.
 6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- [Recommended Order omitted from publication.]